Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES
October Term, 1976

No. 76-1007

SELIGMAN DEVELOPMENT, INC., IRVING R. SELIGMAN, STANTON BOCKNECK, and CARABELL, BOCKNECK, STRAKA AND JURACKS,

Petitioners,

v.

UNITED STATES,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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January 18, 1977

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No._____

SELIGMAN DEVELOPMENT, INC., IRVING R. SELIGMAN, STANTON BOCKNECK, and CARABELL, BOCKNECK, STRAKA AND JURACKS,
Petitioners,

v.

UNITED STATES,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The petitioners -- Seligman Development, Inc., Irving R. Seligman, Stanton Bockneck, and Carabell, Bockneck, Straka and Juracks -- pray that a writ of certiorari issue to review the order of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on December 23, 1976.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto. No opinion was rendered by the District Court for the Eastern District of Michigan on the questions presented herein.

JURISDICTION

The order of the Court of Appeals for the Sixth Circuit was entered on December 23, 1976. A timely petition for rehearing was denied on , and this petition for certiorari was filed within 30 days of that date. This Court's jurisdiction is invoked under 28 USC §1254(1).

QUESTIONS PRESENTED

1. Whether exceptions to 28 USC §1291 created by decisions of this Court and the Courts of Appeals have resulted in a conflict as to the proper interpretation of the final judgment rule.

2. Whether the promotion of the administration of justice requires this Court to resolve the obvious tension between the final judgment rule and increased appeals of interlocutory orders.

STATUTORY PROVISIONS INVOLVED

United States Code, Title 28:
§1291. Final decisions of district courts

The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

STATEMENT OF THE CASE

On March 19, 1976 the District Court sitting in the Eastern District of Michigan issued three grand jury subpoenas duces tecum to petitioners seeking voluminous records pertaining to an FHA insured apartment project located in Ypsilanti, Michigan.

Petitioners, on May 6, 1976, filed a Motion to Quash Grand Jury Subpoenas on the grounds, inter alia, that the subpoenas were unreasonable and oppressive contrary to the Fourth Amendment and Rule 17(c), Federal Rules of Criminal Procedure. Further, petitioners argued that the records sought had already been provided to

HUD and the FBI and at the end of the FBI investigation petitioners were advised that the FBI did not find any criminal involvement at all and were satisfied that no illegal activity occurred.

Petitioners' brief in support of the Motion to Quash also asserted their Fifth Amendment privilege against self-incrimination arguing that many of the records sought were personal records of a partnership tantamount to an individual doing business by himself.

The District Court reluctantly denied petitioners' Motion to Quash by Order dated July 6, 1976 for reasons stated at the oral argument. The District Judge commented:

> "I can certainly sympathize with any citizen who is put in a position where he must deal with separate agencies of the Federal Government and subsequently discovers or realizes that one agency doesn't talk to the other one, anyway."

On July 14, 1976 petitioners filed a Notice of Appeal from the July 6, 1976 Order denying their Motion to Quash. On September 11, 1976 the United States filed a Motion to Dis-

miss or Affirm. In its motion the United States challenged appellate jurisdiction.

On December 23, 1976 the Court of Appeals entered the following dismissal order:

> "Upon consideration, it is ORDERED that the motion to dismiss the appeal for lack of jurisdiction be and it is hereby granted, and the appeal is dismissed. Cobbledick v. United States, 309 U.S. 323 (1940), reaffirmed in United States v. Ryan, 402 U.S. 530 (1971)." See Appendix, at 1.

For the reasons urged below, this Court should re-examine Cobbledick and Ryan.

REASONS FOR GRANTING THE WRIT

1. THE DECISIONS OF THIS COURT AND THE COURTS OF APPEALS ARE IN CONFLICT AS TO THE PROPER INTERPRETATION OF 28 USC §1291.

Section 1291 of Title 28 provides that the "courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States ...."

In United States v. Nixon, 418 US 683 (1974) this Court summarized the relationship between 28 USC §1291 and appeals of an order denying a motion to quash a grand jury subpoena duces tecum as follows:

> "The finality requirement of 28 USC §1291 embodies a strong congressional policy against piecemeal reviews, and against obstructing or impeding an ongoing judicial proceeding by interlocutory appeals. See, e.g., Cobbledick v United States, 309 US 323, 324-326, 84 L Ed 783, 60 S Ct 540 (1940). This requirement ordinarily promotes judicial efficiency and hastens the ultimate termination of litigation. In applying this principle to an order denying a motion to quash and requiring the production of evidence pursuant to a subpoena duces tecum, it has been repeatedly held that the order is not final and hence not appealable. United States v Ryan, 402 US 530, 532, 29 L Ed 2d 85, 91 S Ct 1580 (1971); Cobbledick v United States, supra; Alexander v United States, 201 US 117, 50 L Ed 686, 26 S Ct 356 (1906). This

Court has

> 'consistently held that the necessity for expedition in the administration of the criminal law justifies putting one who seeks to resist the production of desired information to a choice between compliance with a trial court's order to produce prior to any review of that order, and resistance to that order with the concomitant possibility of an adjudication of contempt if his claims are rejected on appeal.' United States v Ryan, supra, at 533, 29 L Ed 2d 85.

"The requirement of submitting to contempt, however, is not without exception and in some instances the purposes underlying the finality rule require a different result. For example, in Perlman v United States, 247 US 7, 62 L Ed 950, 38 S Ct 417 (1918), a subpoena had been directed to a third party requesting certain exhibits; the appellant, who owned the exhibits,

sought to raise a claim of privilege. The Court held an order compelling production was appealable because it was unlikely that the third party would risk a contempt citation in order to allow immediate review of the appellant's claim of privilege. Id., at 12-13, 62 L Ed 950. That case fell within the 'limited class of cases where denial of immediate review would render impossible any review whatsoever of an individual's claims.' United States v Ryan, supra, at 533, 29 L Ed 2d 85.

"Here too, the traditional contempt avenue to immediate appeal is peculiarly inappropriate due to the unique setting in which the question arises. To require a President of the United States to place himself in the posture of disobeying an order of a court merely to trigger the procedural mechanism for review of the ruling would be unseemly, and would present an unnecessary occasion for constitutional confrontation between two branches of the Government. Similarly, a

federal judge should not be placed in the posture of issuing a citation to a President simply in order to invoke review. The issue whether a President can be cited for contempt could itself engender protracted litigation, and would further delay both review on the merits of his claim of privilege and the ultimate termination of the underlying criminal action for which his evidence is sought. These considerations lead us to conclude that the order of the District Court was an appealable order." 418 US at 690-692. (Emphasis added.)

In Perlman, supra, this Court created an exception to the finality rule for third parties. In Nixon, supra, the Court created an exception to the finality rule for the President. In a civil class action suit this Court created another exception to the finality rule for odd-lot traders, stating in Eisen v. Carlisle & Jacquelin, 417 US 156, 170-171 (1974):

"We know, of course, that §1291 does not limit appellate review to 'those final judgments which terminate an

action . . . ,' Cohen v Beneficial Loan Corp., 337 US 541, 545, 93 L Ed 1528, 69 S Ct 1221 (1949), but rather that the requirement of finality is to be given a 'practical rather than a technical construction.' Id., at 546, 93 L Ed 1528. The inquiry requires some evaluation of the competing considerations underlying all questions of finality -- 'the inconvenience and costs of piecemeal review on the one hand and the danger of denying justice by delay on the other.' Dickinson v Petroleum Conversion Corp., 338 US 507, 511, 94 L Ed 299, 70 S Ct 322 (1950) (footnote omitted)."

In Cohen, supra, and Swift & Co. Packers v. Compania Columbiana Del Caribe, 339 US 684 (1950) this Court found further exceptions to the finality rule.

The Courts of Appeals have also found exceptions to the finality rule. Interlocutory orders involving Grand Jury investigations where the courts held appellate jurisdiction existed include: In re Grand Jury Proceedings (U.S. Steel, etc.), 525 F2d 151 (CA3 1975); U.S. v. Doe (Ellsberg Grand Jury Proceeding), 455 F2d 1270

(CA1 1972); Davis v. U.S., 138 F2d 406 (CA5 1943), cert. denied 321 US 775 (1944). See also Westinghouse Electric Corp. v. City of Burlington, Vermont, 351 F2d 762 (CADC 1965); Martin v. Chandis Securities Co., 128 F2d 731 (CA9 1942).

It must also be noted that many decisions have reached the merits of interlocutory problems involving the grand jury with little or no discussion of jurisdiction, implicitly recognizing the gravity and practical finality of the issues raised. See, e.g., United States v. Universal Manufacturing Co., 525 F2d 808 (CA8 1975); In re Biaggi, 478 F2d 489 (CA2 1973); In re Holovachka, 317 F2d 834 (CA7 1963); In re Grand Jury Proceedings, 309 F2d 440 (CA3 1962); Doe v. Rosenberry, 255 F2d 118 (CA2 1958); In re April 1956 Grand Jury (Shotwell), 239 F2d 263 (CA7 1956), cert. denied 352 US 997 (1957); In re Special February 1971 Grand Jury v. Conlisk, 490 F2d 894 (CA7 1973).

2. THE DECISIONS RAISE SIGNIFICANT AND RECURRING PROBLEMS CONCERNING EFFORTS TO INVOKE EXCEPTIONS TO THE FINAL JUDGMENT RULE.

Counsel has informed petitioners of the foregoing exceptions to the finality rule. Not unexpectedly, petitioners think that it would be "unseemly," Nixon, supra, for them to disobey a court order merely to trigger review. Likewise, petitioners think that justice will be denied if review is delayed, Cohen, supra. Petitioners are particularly frustrated and upset by the fact that they voluntarily allowed both HUD and the FBI months to review and copy all the records now sought. In addition, after its extensive review, the FBI, the investigative arm of the United States Attorney's Office and used by the prosecutor to present evidence to the grand jury, gave petitioners a clean bill of health. Now, the judicial system seeks to slam the doors of appellate review shut. To petitioners, the phrase "Equal justice under law" has a hollow ring, since their appeal was summarily dismissed.

It is time for this Court to comprehensively review, in light of contemporary considerations, the various judicially-created exceptions to the finality rule in order to resolve the obvious and increasing tension between the final judgment rule and appeals of interlocutory

orders. See Kaufman v. Edelstein, 539 F2d 811, 817 (CA2 1976) where Judge Friendly, speaking of an analogous situation with respect to the use of prerogative writs, commented:

> "The case against this is that these statements reflected the narrow view with respect to the scope of the prerogative writs which the Supreme Court then entertained but from which it has since departed, notably in LaBuy v. Howes Leather Co., 352 U.S. 249, 77 S.Ct. 309, 1 L.Ed.2d 290 (1957), and Schlagenhauf v. Holder, 379 U.S. 104, 85 S.Ct. 234, 13 L.Ed.2d 152 (1964). See also the dicta in Will v. United States, 389 U.S. 90, 88 S.Ct. 269, 19 L.Ed.2d 305 (1967), and Note, Supervisor and Advisory Mandamus under the All Writs Act, 86 Harv.L.Rev. 595 (1973). That it has departed in some degree is clear enough; what is unclear is how far. Probably this cannot be completely determined until the Court speaks again; there is an obvious tension between the final judgment rule and increased use of the prerogative writs to review orders that are interlocutory even in light of Cohen, which must be resolved on a more principled basis than how much a court of appeals disapproves the district court's ruling in the particular case."

Similarly, in this case it is time to resolve on a "principled basis" judicially-created exceptions to Cobbledick, supra, and Ryan, supra.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the order of the Sixth Circuit.

Respectfully submitted,

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APPENDIX

No. 76-2104

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED

DEC 29 1976

JOHN P. HEHMAN, Clerk

IN RE: GRAND JURY SUBPOENAS -
SELIGMAN DEVELOPMENT, INC.,
IRVING R. SELIGMAN,
STANTON BOCKNECK, and
CARABELL, BOCKNECK,
STRAKA AND JURACKS,

Plaintiffs-Appellants

ORDER

Before PHILLIPS, Chief Judge, WEICK and EDWARDS, Circuit Judges.

Upon consideration, it is ORDERED that the motion to dismiss the appeal for lack of jurisdiction be and it is hereby granted, and the appeal is dismissed. Cobbledick v. United States, 309 U.S. 323 (1940), reaffirmed in United States v. Ryan, 402 U.S. 530 (1971).

ENTERED BY ORDER OF THE COURT.

John P. Hehman
Clerk

CERTIFICATE OF SERVICE

I hereby certify that on January 18, 1977, three (3) copies of the Petition for Writ of Certiorari and Appearance were mailed air mail, postage prepaid to the Solicitor General, Department of Justice, Washington, D.C. 20530, and three (3) copies of said Petition and Appearance were also mailed on that same day by first-class mail, postage prepaid, to Philip Van Dam, United States Attorney, and Harold Gurewitz, Assistant United States Attorney, Room 704 Federal Building, Detroit, Michigan 48226. I further certify that all parties required to be served have been served.

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